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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 4, 2004

Case No.: TIA-0222

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.[1]

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.[2] Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.[3] Subpart E provides that all Subpart D claims will be considered as Subpart E claims.[4] OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a machinist at the DOE's Rocky Flats plant (the plant). He worked at the plant for approximately thirty-six years, from September 1952 to January 1988.

The Applicant filed an application with the OWA, requesting physician panel review of the Worker's diffuse large cell lymphoma. The Applicant asserted that the Worker's illness was the result of exposure to hazardous chemicals and radiation at the plant.

The Physician Panel rendered a negative determination with regard to the illness. The Panel agreed that the Worker

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[1] *See* OWA website, *available at* http://www.eh.doe.gov/advocacy/index.html

[2] Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

[3] *See id.* § 3675(a).

[4] *See id.* § 3681(g).

had lymphoma, but two members of the Panel concluded that it was not due to toxic exposure, i.e., radiation and metalworking fluids. One member of the Panel determined that the Worker's lymphoma was associated with his exposure to metalworking fluids during the course of his employment.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal.

In her appeal, the Applicant advances three arguments. First, she argues that the Physician Panel concentrated on dosimetry records belonging to another person. She refers to a place in the Physician Panel report where the Worker was referred to by the wrong name. Second, the Applicant argues that the Worker could have been exposed to a number of toxic substances which were not considered by the Panel. She notes a letter from the DOE's Rocky Flats field office which states that "portions of several documents in [the Worker's] employment record were blacked out at some time in the past."[5] In addition, she notes the National Institute for Occupational Safety and Health (NIOSH) is in the process of completing a dose reconstruction. Third, the Applicant argues that radiation and metalworking fluids caused the Worker's illness. The Applicant submits a physician's opinion to that effect, as well as a complete copy of a January 1998 NIOSH report entitled "Occupational Exposure to Metalworking Fluids."

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant is correct that one place in the report refers to a person other than the Worker. Nonetheless, the

[5] DOE Rocky Flats Field Office Letter dated November 20, 2001.

record indicates that the Physician Panel reviewed the correct records. The record contains only the Worker's medical and employment records and the Panel discussed these records in its report. Accordingly, the Panel's reference to a different name is harmless error.

Although the Applicant refers to the possibility of additional exposure information, the record indicates that the Panel reviewed all available records. While portions of the Worker's records contain deletions, there is no indication that the plant did not supply all the available information related to the Worker. As the Applicant recognizes, the DOE field office pointed out the deletions, stated that they occurred sometime in the past and that the site provided copies of the documents "exactly as they appear in our files."[6] In any event, the deletions do not appear to relate to exposure information.[7] As to the pending status of a NIOSH dose reconstruction, the Physician Panel makes its determination based on the records presented to it. When the NIOSH does reconstruction is completed, it may warrant reconsideration of the claim.

Finally, the Applicant's argument that the Worker's illness was related to radiation and metalworking fluids does not indicate Panel error. The Panel considered exposure to radiation and metalworking fluids and found that they were not a significant factor in causing, aggravating, or contributing to the Worker's illness. In the view of the two-member majority, there was insufficient evidence to find a link between the Applicant's exposure and his illness, and it was much more likely associated with genetic factors. Given the Panel's discussion on this issue, the Applicant's argument about the role of radiation and metalworking fluids is a disagreement with the Panel's medical opinion, rather than an instance of Panel error. Again, if the NIOSH dose reconstruction indicates additional radiation exposure, reconsideration may be warranted.

As the foregoing indicates, the Applicant has not demonstrated material error. Accordingly, the appeal should be denied.

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[6] DOE Rocky Flats Field Office Letter dated November 20, 2001.

[7] For example, personal data supplied by the Worker, such as weight, height, date of birth, place of birth, marital status was deleted. *See* Record at "Employment Application."

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0222 be, and hereby is, denied.

(2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005